United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1597

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee-Plaintiff,

v.

HAROLD HANESWORTH,
Appellant-Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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INDEX.

CASES CITED.

II.

STATUTE.

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BRIEF FOR APPELLEE

Issues

1. Defendant does not meet all the criteria for sentencing under the Narcotics Addict Rehabilitation Act, 18 U.S.C. § 4251 *et seq.*

2. Denial of an examination pursuant to 18 U.S.C. § 4252 was within the sound discretion of the sentencing court.

3. Defendant is not an eligible offender within 18 U.S.C. § 4251(f).

4. Defendant was not an addict at the time of sentencing.

5. Defendant is not likely to be rehabilitated through NARA treatment.

Statement of the Case

The Government is satisfied with the defendant's Preliminary Statement and Statement of Facts.

POINT I

Defendant does not meet all the criteria for sentencing under the Narcotics Addict Rehabilitation Act, 18 U.S.C. § 4251 *et seq.*

There can be no quarrel with defendant's statement that the broad purpose of the Narcotics Addict Rehabilitation Act (NARA) was: "that certain persons charged with or convicted of violating federal criminal laws, *who are determined to be addicted to narcotic drugs, and likely to be rehabilitated through treatment*" should in lieu of traditional penal sanctions be civilly committed for treatment (Defendant's Brief p. 13) (emphasis supplied). Yet, as noted by the United States Supreme Court in *Marshall v. U.S.*, 414 U.S. 417 (1974) it was not the purpose of Congress to make every addict eligible for civil commitment simply by reason of his addiction. *id.* at 423-424. In fact, the majority of the court acknowledged that there is no fundamental right to rehabilitation from narcotic's addiction at public expense. *Marshall v. U.S., supra* at 421.

In recognition of the medical uncertainties surrounding narcotics rehabilitation, the experimental nature of the program and the limited resources available, Congress set up a flexible framework within which the sentencing court can exercise its discretion in selecting those addicts most likely to respond to rehabilitative treatment. *Marshall v. U.S., supra* at 426. However, in making this alternative available Congress did not seek to restrict the authority of the federal courts to impose traditional penal sanctions where appropriate:

> "After carefully considering the proposed legislation, as amended, the committee finds that it offers a flexible and logical means to provide for the treatment of drug addicts who are likely candidates for rehabilitation without essentially changing the authority of law enforcement officers and the courts to enforce full criminal actions in appropriate cases." S.Rep. No. 1667, p. 37; *Marshall v. U.S., supra,* 424 n.6.

Before sentencing under NARA will be imposed the sentencing court must be satisfied that three prerequisites exist: (1) that the person is an addict; (2) that he is an eligible offender; and (3) that he is likely to be rehabilitated through treatment. 18 U.S.C. §§ 4252, 4253.

It is axiomatic that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed appellate review is precluded. *Dorszynski v. U.S.,* 418 U.S. 424, 431 (1974); *Gore v. U.S.,* 357 U.S. 386, 393 (1958); *Towsend v. Burke,* 334 U.S. 736, 741 (1948). The sentencing courts' determination is not to be disturbed on appeal absent a showing that the judge abused or failed to exercise his discretion. *U.S. v. Clark,* 475 F.2d 240, 251 (2nd Cir. 1973); *U.S. v. Barrow,* 540 F.2d 204 (4th Cir. 1976). Furthermore, defendant's contention that the court in exercising its discretion is obligated to articulate its reasons so that they may be evaluated by a reviewing court is without merit. The Supreme Court, in passing on a similar contention concerning sentencing under the Federal Youth Corrections Act (a statute more demanding in its requirement that the court in denying such disposition must find on the record that the youth would not benefit from such disposition, 18 U.S.C. § 5010(d)) refused to imply such an obligation, holding that the finding of no benefit need not be accompanied by supporting reasons. *id.* at 425, 426.

POINT II

Denial of an examination pursuant to 18 U.S.C. § 4252 was within the sound discretion of the sentencing court.

Defendant's contention that the trial court's refusal to order an examination under 18 U.S.C. § 4252 contravened the due process clause of the Fifth Amendment is clearly without merit. A review of the statute itself reveals that resort to such an examination is completely discretionary:

> "*If* the court believes that an eligible offender is an addict, it *may* place him in the custody of the Attorney General for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment." 18 U.S.C. § 4252 (emphasis supplied).

In *U.S. v. Williams*, 407 F.2d 940, 944 (4th Cir. 1969) the court specifically adopted this interpretation "agreeing with the government that the legislative choice of the word 'may' instead of the word 'shall' clearly indicates an intention to confer upon district judges reasonable discretion whether to commit for an examination". As was stated in *Neria v. U.S.*, 493 F.2d 913 (5th Cir. 1974):

> If a defendant is to get NARA rehabilitative sentencing the court must determine that he is an eligible offender and believe that he is an addict; then the court may in its discretion place him in the Attorney General's custody for an examination. *id.* at 914. See also *Marshall v. U.S., supra,* at 427; *U.S. v. Hamilton,* 462 F.2d 1190 D.C.Cir. 1972; *U.S. v. McDonald,* 455 F.2d 1259 (1st Cir.) cert. denied 406 U.S. 962, 971; *U.S. v. Barrow,* 540 F.2d 204, 205 (4th Cir. 1976); *U.S. v. Hart,* 488 F2d 970 (5th Cir. 1974); *U.S. v. Phillips,* 403 F.2d 963 (6th Cir. 1968); *U.S. v. Clark,* 475 F2d 240, 251 n.15 (2nd Cir. 1971).

The Government readily concedes that Hanesworth was entitled, and the court obligated to exercise its discretion as to

treatment under NARA or incarceration. *U.S. v. Clark, supra,* at 251. However, this is not a case where the reviewing court is unable to determine from the record whether the trial court ever considered the defendant's eligibility for disposition under NARA. *U.S. v. Gaines,* 436 F.2d 150 (D.C.Cir. 1970); *U.S. v. Williams, supra,* at 944. Here defense counsel requested and was heard on the issue of NARA treatment for his client, and the need for an examination pursuant to Section 4252, 18 U.S.C. (Defendant's Appendix p. A-66). Defendant has not carried the burden of showing that the trial court, presented with evidence that the defendant was an addict, did not consider invoking the provisions of NARA. The judge examined all the evidence concerning the defendant's drug habits, and the record indicates that he specifically considered the provisions of NARA and exercised his discretion in rejecting that proposal (Defendant's Appendix p. A-72). Furthermore, the Government maintains that the sentencing judge did not abuse its discretion in denying NARA sentencing, as Hanesworth was neither an addict, an eligible offender, or likely to be rehabilitated through treatment.

POINT III

Defendant is not an eligible offender within 18 U.S.C. § 4251(f).

Contrary to defendant's contention, there is considerable question whether in fact he was an eligible offender. 18 U.S.C. § 4252(f)(2) excludes from the definition of eligible offender one who is convicted of selling a narcotic drug, "unless the court determines that such sale was for the primary purpose of enabling the offender to obtain a narcotic drug which he requires for his personal use because of his addiction to such drug." *id.* Evidence at trial established that when Hanesworth made the purchase for the undercover agent he added cash of unknown origin and obtained twice

the amount of drugs (Defendant's Appendix pp. A-22, A-34). The Government maintains that this does not solely indicate that his primary motive for drug dealing was for his personal need. This evidence, when coupled with his past history of drug dealing, is equally susceptible of the inference that he was making an additional purchase for someone else. Therefore, the sentencing court did not abuse its discretion in denying an examination or in denying NARA sentencing, as Hanesworth was not an eligible offender.

POINT IV

Defendant was not an addict at the time of sentencing.

In the instant case the court was presented with evidence that the defendant was twice before certified a heroin addict and confined to the Masten Park facility, New York State program which the court regarded as every bit as good as the federal program (Defendant's Appendix p. A-73). Hanesworth completed his certification partly in the hospital and partly as an out-patient. Notably, he claimed at that time, and again in his pre-sentence memorandum interview, that he "had no further problems with drugs except that (he) was taking the methadone"(Defendant's Appendix p. A-73). This statement is crucial, as the key determination is not whether defendant was in the past a heroin addict, or even whether he was an addict when he committed the offense, but whether he was at the time of sentencing addicted to narcotics. *U.S. v. Ross*, 404 F.2d 376, 381 (2nd Cir. 1972). In *U.S. v. Ross, supra,* a similar statement by a defendant was a determinative factor in the court's upholding the denial of NARA sentencing. The Government contends that these factors alone were sufficient to support the court's doubt whether Hanesworth was at the

time of sentencing an addict, and therefore the court's denial of an examination under 18 U.S.C. § 4252.[1]

POINT V

Defendant is not likely to be rehabilitated through NARA treatment.

While the Government does not contend that Hanesworth's prior conviction for possession of a shotgun alone makes him an ineligible offender, 18 U.S.C. § 4251(f)(1), this along with his entire record of criminality and narcotics dealing are factors properly included in the totality of circumstances relevant to a determination of NARA sentencing. In *U.S. v. Barrow, supra,* the Fourth Circuit upheld a denial of NARA sentencing on the basis of a similar record:

> In the instant case the record of the sentencing proceeding clearly indicates that the judge considered a range of factors, such as defendant's criminal record and past performance in drug rehabilitation programs, in reaching his decision. Actual disposition under 18 U.S.C. § 4253 requires an ultimate determination by the judge that the addict "is likely to be rehabilitated through treatment." It is well within the sound discretion of the sentencing judge to determine, as he did, that the defendant's personal history indicated that she would not be susceptible to treatment. *id.* at 205.

Here, the sentencing court was confronted with defendant's long history of involvement with drugs, past unsuccessful attempts at rehabilitative treatment and continued criminality.

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[1] The sentencing court specifically stated on the record "I think you having been in one program and it didn't work for you, *and if you are an addict, which I'm not sure you are,* it would be inappropriate to commit you again under a comparable federal program." (Defendant's Appendix p. A-73) (emphasis supplied)

Surely on the basis of such a record it would not be an abuse of discretion to find that he was an unlikely candidate for rehabilitation.

Conclusion

As noted earlier, Congress contended that the NARA program be available to those most deserving and likely to benefit from its provisions. On the basis of the record before it, it was well within the sentencing court's discretion to decide, as it did, that there had been insufficient evidence of Hanesworth's addiction to narcotics, his statutory eligibility, and the likelihood of successful rehabilitation to justify its refusal to grant alternative sentencing under NARA.

For these reasons, the Government respectfully requests that defendant's sentence not be disturbed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

No. 76-1597

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: United States of America
vs
Harold Hanesworth

I, LaVerne C. Cooley, Jr. being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 20th day of April, 1977 I mailed _____ copies of a printed Appellee Brief in the above case, in a sealed, postpaid wrapper, to:

10 copies to: A. Daniel Fusaro, Clerk
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: James O. Renda, Esq.
405 Brisbane Building
Buffalo, New York 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara, United States Attorney, Att: Edward J. Wagner, Asst. U.S. Attorney
502 United States Courthouse, Buffalo, New York 14202

LaVerne C. Cooley, Jr.

Sworn to before me this
20th day of April, 1977
Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1977